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Supreme Court, U.S.
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No. 97-582

In The

Supreme Court of the United States

October Term, 1996

TRUSTEES OF BOSTON UNIVERSITY,

Petitioner,

vs.

THE LINKAGE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Boston University's petition should be denied because the University never raised its newly contrived "Federal" Constitutional claims in the trial court or on appeal to the Supreme Judicial Court of Massachusetts?

II. Whether Boston University's petition should be denied where the decision of the Supreme Judicial Court does not subject the University to disparate treatment in violation of the University's right to equal protection under the law, nor abridge the University's right to due process or infringe upon the University's right to academic freedom?

III. Whether Boston University's petition should be denied where the University was afforded a fair trial and the University is unable to demonstrate a violation of the due process clause of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the caption.

Pursuant to Rule 29.6 of this Court, the respondent, Linkage Corporation, states that it has no parent company, subsidiary, or affiliate that is not wholly owned.

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The respondent Linkage Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Massachusetts Supreme Judicial Court's opinion in this case.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 425 Mass. 1, 679 N.E. 2d 191 (1997) and is reproduced in the appendix attached to the Petition for Writ of Certiorari at pp. 1a to 37a.

COUNTERSTATEMENT OF THE CASE

A. Introduction.

In a final, desperate attempt to avoid accountability for breaching a contract with Linkage Corporation ("Linkage"), and a concomitant assessment of exemplary damages pursuant to the Commonwealth's consumer protection statute, M.G.L. Chapter 93A, the Trustees of Boston University ("Boston University" or "the University") seek favor with this Court by misrepresenting the facts and the record. These misrepresentations include a transparent attempt by the University to establish a basis for this Court to grant certiorari where a basis otherwise does not exist. In its Petition, the University has for the first time during the lengthy course of this litigation asserted that its rights to equal protection and due process under the Fourteenth Amendment and its right to academic freedom under the First Amendment of the Constitution of the United States have been abridged. These claims were never raised in the trial court, in the University's application requesting direct appellate review by the Supreme Judicial Court, in the University's principal appellate brief, nor in its reply brief or in its Petition for Rehearing. Even if the University had timely raised such claims, these arguments would have been rejected as being wholly without merit.

B. Factual Background.

Boston University approached Philip Harkins in 1988 to discuss the feasibility of Linkage generating substantial revenues to offset the University's considerable overhead at a recently

donated facility located in Tyngsborough, Massachusetts. Joseph Meng, Vice President of Boston University and a close personal friend and confidant of the University's President, John Silber, negotiated contract terms with Harkins and the University's General Counsel office drafted the actual agreement ("base agreement"). Important protection to Harkins was the provision in the base agreement that provided that for one year after termination of the agreement neither Linkage nor Boston University could hire the other's employees. The base agreement commenced on August 1, 1988, and was to terminate on July 31, 1991.

Fulfilling its obligations under the base agreement, Linkage successfully delivered corporate education seminars and conferences to businesses and the public, which resulted in a financial windfall for the University. Although responsible for all revenues at Boston University Corporate Education Center ("BUCEC"), revenues generated solely by Linkage for the University increased from $425,000 in 1989 to $5,691,000 in 1991. The business plan drafted in the spring of 1991, in connection with the negotiations to renew the base agreement for three additional years, forecasted further impressive growth in revenues. Contrary to the statement appearing in the University's Petition that Linkage only projected a profit of $9,000 for the last six months of the base agreement, Linkage's 1991 tax return showed that Linkage had net income in 1991 of $259,361 and, according to testimony at trial, Linkage projected net income for 1991, assuming Boston University had not breached the renewal contract, of $702,000.

Evidence at trial also established that Vice President Meng had authority to bind the University to the renewal contract negotiated in the spring of 1991 and executed on May 21, 1991. The jury and the trial judge both found that Meng had apparent authority to bind the University to this contract and these findings were rightfully affirmed on appeal by the Supreme Judicial Court. These findings were justified given Meng's unrebutted trial testimony that Silber had expressed enthusiasm for the Linkage arrangement and gave approval to Meng in November, 1990 to go ahead and renew the contract. Thus, not only had the University placed Meng in a position of apparent authority to execute the May

21, 1991 contract, but by virtue of President Silber's November, 1990 statement to Meng, he had already given his approval for the renewal of the contract well in advance of the May 21, 1991, agreement being signed.

The assertion appearing in Boston University's Petition concerning President Silber's strong reservations about Linkage's performance at BUCEC was the subject of sharply disputed testimony at trial. The jury heard testimony that James Devlin, Silber's son-in-law, had been reprimanded by Harkins for making derogatory and racially-biased statements while teaching at the BUCEC facility, and that Devlin had complained to his father-in-law about Harkins. From the spring of 1991 to the time that Boston University precipitously terminated the renewal contract and took over the facility on July 3, 1991, Silber had been meeting secretly with his son-in-law, with a Linkage employee, and another individual, for the purpose of covertly obtaining information about Linkage's programs, operations, and employees. Boston University's preparations for the takeover and breach of the Linkage renewal contract included fifteen and one-half hours of long distance telephone calls in the middle of the night between June 22 and June 28, 1991. The testimony at trial established that during this time period, based on the overt actions of the University, Linkage continued to believe that the base contract had been renewed for an additional three years.

The first time Silber expressed reservations about the Linkage renewal contract was on or about June 24, 1991. Rather than being concerned about issues of quality and performance by Linkage, as claimed by the University in its Petition, the evidence before the jury and the trial judge, as well as the Supreme Judicial Court, was that Silber was more concerned with creating a pretext to justify terminating the base agreement, to deny the existence of the renewal agreement and to misappropriate the value created by Linkage for the financial benefit of Boston University.

The claim asserted by Boston University in its Petition that Linkage failed to provide financial information to the University is belied by the evidence at trial which established that the information in the business plan, as well as all financial information concerning

Linkage's programs, had already been communicated to Boston University's financial office. For this reason, no audit had been deemed to be necessary during the three years of the base contract, and no audit had been determined to be necessary before signing the May 21, 1991 renewal agreement. Boston University's Chief Financial Officer, Joseph Mercurio, looked at the numbers Linkage was projecting for the next three years and told Harkins that Linkage was really doing a good job and was perhaps the best performer in providing reliable numbers to University's financial office. Meng asked Boston University Treasurer Kevin Condon whether an audit should be carried out before the new contract was signed. Condon replied that an audit could be done the following year. Linkage had already been responsible for successfully turning BUCEC into a profitable enterprise, with revenues in 1991 in excess of $9,000,000. Contrary to the claim contained in the University's Petition, the evidence at trial was that the greatest revenues and profitability was the result of Linkage-generated income.

Boston University further misrepresents the record by once again alleging wholesale theft of University property by Linkage. This claim was tried to the jury via the University's conversion counter-claim. The University deceives this Court by ignoring in its Petition that the jury found, in an answer to a special question, that there was no such theft of University property. Because the University did not appeal from this portion of the jury's verdict, the jury's finding that Linkage did not steal University property is incontestable.

Contrary to the assertion contained in the University's Petition, Harkins did not seek a mutual cessation of the base agreement on July 1, 1991. Rather, the evidence at trial, which has been ignored in the University's Petition, was that Harkins informed Silber on that day that Linkage had an agreement with Boston University for the three-year renewal of the contract. Further, on July 3, 1991, the University did not propose an immediate neutral termination of the contract as claimed by the University. Rather, the evidence at trial was that President Silber demanded that Linkage sign a letter containing a waiver of the "no-hire" provision of the contract on that day. When Harkins declined, citing his desire to consult

with counsel, Silber withdrew the first letter, and handed Harkins a second letter, which terminated the contract "for cause" based on the results of a purported unfavorable audit and the alleged failure of Linkage to cooperate with auditors. The jury and the trial judge found, on an abundance of evidence, that there was no basis for this termination. There was no failure of Linkage to cooperate with auditors, and the audit was a pretextual farce. The Supreme Judicial Court was more than justified in affirming these factual findings of the jury and the trial judge.

Boston University cannot dispute the existence of a contract provision prohibiting the University from hiring Linkage's employees. Nor can the University dispute that there was substantial evidence at trial which supported a finding that, with military-like planning and precision, the University ousted Linkage from the BUCEC facility, plundered Linkage assets, hired 28 out of Linkage's 32 employees, examined and misappropriated Linkage documents, attempted to destroy Linkage's reputation in the community, and destroyed Linkage as a going concern. Boston University also does not dispute that it defamed Linkage as part of this scheme by stating that Harkins had "cooked the books", that $700,000 was missing, and that the shredder got a lot of use over the weekend prior to the takeover. The trial judge properly found, on an abundance of credible evidence, that these actions were taken as a result of Silber's and the University's predatory business motivation to put Linkage out of business in order to allow the University to seize the bountiful fruit of the BUCEC operation that had been developed and nurtured by Linkage for the last three years. (A. 81a).

The University's actions as well as the nature of its breach of the renewal contract establish that its conduct was carried out in a "business context". Where the University inserted itself into the marketplace, it is only proper to subject the University to the rules of ethical behavior and fair play as required by the Massachusetts Consumer Protection Statute, M.G.L. c. 93A.

C. Procedural History.

The Verified Complaint filed by Linkage on July 11, 1991, included claims against Boston University for Breach of the Base

Contract (Count I), Breach of the Renewal Contract (Count II), Breach of the MET Contract (Count III), Defamation (Count V), Interference with Advantageous Relationships (Count VI), Breach of Covenant of Good Faith and Fair Dealing (Count VII), Promissory Estoppel (Count VIII), and Violation of M.G.L. c. 93A (Count IX). Boston University filed an Answer and asserted eight Counterclaims against Linkage, including claims for Breach of Contract (Count I); Breach of Fiduciary Duty (Count II), Fraud (Count III), Violation of M.G.L. c. 93A (Count VI); and Conversion (Count IX). Appearing on behalf of Boston University was the law firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo ("Mintz, Levin firm").

After extensive discovery was pursued by both parties, Boston University moved for partial summary judgment. Linkage opposed this motion and following a hearing on the motion, Judge Patrick J. King, on June 15, 1993, ordered summary judgment to Boston University on Count II (Breach of the Renewal Contract), Count III (Breach of the MET Contract), Count IV (Wrongful Entry & Eviction), Count VII (Breach of Covenant of Good Faith and Fair Dealing), Count VIII (Promissory Estoppel) and Count X (Declaratory Judgment) of Linkage's Complaint.

For the first time, on November 10, 1993, Linkage's counsel discovered that Judge King is an alumnus of Boston University School of Law, and that prior to his appointment to the bench he had been an associate member of the Mintz, Levin firm. At no time did Judge King, Boston University or anyone at the Mintz, Levin firm disclose to Linkage or its attorneys Judge King's prior contacts with the University and its defense counsel. Upon discovery of these contacts, Linkage moved for Judge King to recuse himself from any further involvement with this action. By order dated December 22, 1993, Judge King granted Linkage's motion and recused himself.

Because of Judge King's recusal and his impartiality having been placed into question, Linkage moved for relief from his June 15, 1993 partial summary order. Linkage argued that given Judge King's recusal, his summary judgment order, which substantively adjudicated six Counts of Linkage's Complaint against it, should

be set aside. Linkage also requested relief on the ground that Judge King's summary judgment order contained substantive errors of law and fact. The trial judge, Judge Vieri Volterra, denied Linkage's motion. However, he decided to let all of Linkage's claims be submitted to the jury so as to avoid a lengthy re-trial if Judge King's summary judgment decision was reversed on appeal.

On July 15, 1994, following a seven-week trial, before Judge Volterra sitting with a jury, during which twenty-seven witnesses testified and one-hundred forty-four exhibits were introduced into evidence, the jury returned a verdict in favor of Linkage on its claims under Counts II, V, VI, VII, VIII and IX of its Complaint and awarded damages to Linkage in the amount of $6,106,238. The damages, broken down by Count, were as follows: Breach of the Renewal Contract (Count II) $330,358 for out-of-pocket expenses and $2,148,000 for lost profits; Defamation (Count V) $1,060,641; Interference with Advantageous Relationships (Count VI) $280,000; Breach of Covenant of Good Faith and Fair Dealing (Count VII) $250,000; Promissory Estoppel (Count VIII) $787,239; M.G.L. c. 93A (Count IX) $1,250,000. The jury rejected all of Boston University's counter-claims, although it did award to Boston University $74,246 for out-of-pocket expenses it paid on behalf of Linkage prior to its breach of the renewal contract.

On October 31, 1994, Judge Volterra granted in part, Boston University's motion for a judgment notwithstanding the verdict as to Counts II, VII and VIII. In granting this relief to the University, Judge Volterra acknowledged that Judge King previously granted Boston University's motion for summary judgment with regard to these claims and that although he submitted them to the jury, he would, solely out of deference to Judge King's summary judgment order, grant the University's motion for judgement notwithstanding the verdict as to Count II (renewal contract) and Count VIII (promissory estoppel). Judge Volterra also allowed Boston University's motion for judgment not withstanding the verdict on Count VII (Breach of Covenant of Good Faith and Fair Dealing) because he agreed with Judge King that the damages awarded under this Count were duplicative of the damages sought by Linkage under its breach of contract claim.

On March 16, 1995, Judge Volterra issued a Memorandum of Decision on Linkage's M.G.L. c. 93A claim in which he ruled that he was treating the jury's verdict in favor of Linkage on this claim as advisory. In his independent adjudication of this claim, Judge Volterra found that Boston University willfully and knowingly violated M.G.L. c. 93A. As damages due to Linkage arising from Boston University's violation of this statute, Judge Volterra ordered that the jury's damages award on Linkage's claims which remained intact — defamation damages of $1,060,641 (Count V) and tortious interference damages of $280,000 (Count VI) — be doubled and that Linkage recover $899,841.04 in costs and attorney fees. In doing so, Judge Volterra took away from Linkage the Jury's 93A damage award of $1,250,000.

By orders dated April 4, 1995, Judge Volterra reinstated the jury's verdict for the $330,358 out-of-pocket damages awarded under Count II and $787,239 awarded under Count VIII. Judge Volterra further ordered these damage awards doubled in accordance with his 93A ruling. A Judgment and Amended Judgments entered in Linkage's favor against Boston University in March and April 1995. Both parties filed Notices of Appeal.

On May 15, 1997, the Supreme Judicial Court issued a unanimous opinion in which it reversed Judge Volterra's grant of judgment notwithstanding the verdict to Boston University on Linkage's claim for breach of the renewal contract (Count II) and ordered reinstatement of the jury's damage award of $2,411,852. The court also upheld the award to Linkage on its M.G.L. c. 93A claim and ordered that Linkage's damages for breach of the renewal contract be doubled.

Contrary to the University's claim that the Supreme Judicial Court's opinion reflects a "conscious decision to whitewash the whole proceeding" (Petition at 24), the Supreme Judicial Court accepted the University's appellate arguments that: (1) the jury's award of $280,000 in damages for tortious interference was insupportable; (2) the jury's award of $787,239 in damages for promissory estoppel and award of $250,000 for breach of the implied covenant of good faith and fair dealing were duplicative; and (3) although the Supreme Judicial Court found that Linkage

introduced sufficient evidence at trial to establish defamation, the Court held that the jury's award of defamation damages of $1,060,641 was unsupported by the evidence, was excessive and probably was punitive. As a result of these rulings, the Supreme Judicial Court reversed jury awards against the University in excess of two-million, three-hundred thousand dollars.[1] The Supreme Judicial Court denied Boston University's Petition for Rehearing on July 3, 1997.

REASONS FOR DENYING THE WRIT

I. BOSTON UNIVERSITY'S APPLICATION FOR A WRIT OF CERTIORARI MUST BE DENIED BECAUSE THERE IS NO JURISDICTION OVER THE UNIVERSITY'S BELATED AND CONTRIVED "FEDERAL" CONSTITUTIONAL CLAIMS.

Following six years of litigation including a seven-week trial, extensive post-trial motions, briefings, and hearings, and exhaustive appellate briefing and argument before the Supreme Judicial Court as well as a petition for rehearing, Boston University now contends in its writ application before this Court, that its rights under the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution were violated. The University's assertions are a brazen attempt to create a "federal question" where none has ever before been raised

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1. If these jury awards had been allowed to stand, then the trial judge's order doubling these damages would have also been allowed to stand where the Supreme Judicial Court affirmed the trial judge's findings that the University had violated c. 93A. Thus, the Supreme Judicial Court's decision took away from Linkage more than $4,600,000 damages which had been awarded to it in the trial court. Viewed in this light, Boston University's ad hominem attack on the integrity of Supreme Judicial Court as a "biased tribunal," a "capricious court" and a court that made a "conscious decision to whitewash the whole proceeding" (Petition at 19, 24) is exposed as patently absurd. Indeed, such attacks do nothing more than discredit Boston University and its counsel. *See United States v. Kimberlin*, 898 F.2d 1262, 1266 (7th Cir. 1990) ("Lawyers who launch ad hominem attacks on the bench and their adversary bring dishonor only on themselves.")

or argued. The long-standing jurisdictional requirements and accompanying prudential concerns of this Court cannot remotely be satisfied, mandating the summary denial of the Petition.

It is fundamental that jurisdiction of this Court under 42 U.S.C. § 1257 over state court decisions only lies where a substantial federal question has been properly and timely raised in the state court proceeding. *Adams v. Robertson*, 117 S. Ct. 1028 (1997); *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Webb v. Webb*, 451 U.S. 493, 496 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).[2] This Court's own procedural rules mandate that the certiorari petition specifically reference the manner, method, and time of raising the federal questions sought to be reviewed. Sup. Ct. R. 14.1(g)(i).

The considerations underlying this jurisdictional prerequisite include: (a) the need for an informative record, which will not exist where the federal question was not addressed; (b) the importance to the federal system of allowing state courts the first opportunity to consider state statutes "in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality"; and (c) the purported federal question, if raised, might be addressed on "adequate and independent" state grounds rendering unnecessary any review by this Court. *Cardinale*, 394 U.S. at 439; *Webb*, 451 U.S. at 499-500. These considerations are "powerful," requiring enforcement of the jurisdictional requirement "with sufficient rigor to make reasonably certain that [the Court] entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below." *Webb*, 451 U.S. at 499.

The jurisdictional prerequisite of properly and timely raising the "federal" question includes the obligation to have brought to the state court's attention with fair precision the specific federal claim and the supporting grounds. "It is well settled that it must be made to appear that some provisions of the Federal, as distinguished from the state, Constitution was relied upon, and that such

2. Indeed, 42 U.S.C. § 1257 formalizes this requirement by requiring that the federal question have been "drawn in question" or "specially set up or claimed."

provisions must be set forth." *New York Central & H.R. Co. v. New York*, 186 U.S. 269, 273 (1902); *New York ex. rel Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928). Indeed, given the overriding importance of federal-state comity, assertions in the state proceeding such as a "denial of constitutional rights" or "due process" or "equal protection" violations are inadequate to preserve a federal constitutional claim. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914); *see Beck v. Washington*, 369 U.S. 541, 549-50 (1962) (where state court does little more than discuss the interpretation of state statute in question, without considering such interpretation in light of a federal question properly presented to it, this Court cannot consider the federal points).

Boston University's newly fabricated "federal constitutional" assertions were never presented or pursued by the University before the Supreme Judicial Court, or in its Petition for Rehearing. The magnitude of the University's failing is exhibited by the fact that these "federal" questions are absent from the numerous legal contentions raised during the pleading, discovery, and summary judgment stages, at any time during the seven week trial, the 281 pages of argument presented by the University in post-trial motions and hearings, or the 159 single-spaced pages of appellate argument presented to the Supreme Judicial Court on appeal and petition for rehearing.

The University's resort to the Supreme Judicial Court's decision as the operative state action is of no solace. Nowhere in the opinion is any federal question mentioned, let alone expressly passed upon. *See Webb*, 451 U.S. at 495 (when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court . . . ") and cases cited. Massachusetts has a firmly imbedded practice of requiring all issues and claims to be raised at the trial level for proper appellate consideration. *Commonwealth v. Amirault*, 424 Mass. 618, 641, 677 N.E. 2d 652, 667 (1997). Not only did the University fail to raise either the federal equal protection or First Amendment arguments at the trial and post-trial level, no such contention was even remotely referenced or raised before the Supreme Judicial Court. *See Ferguson v. Georgia*, 365 U.S. 570,

572 (1961) (failure to raise federal question in accordance with state practice defeats review by Supreme Court); *See also Williams v. Georgia*, 349 U.S. 375, 382-83 (1955) (state rule "which forbids the raising of federal questions at later stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power"); *Beck*, 369 U.S. at 550 (state supreme court's refusal to consider constitutional attack upon statute not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute provides no jurisdiction in Supreme Court).

The applicability of M.G.L. c. 93A to the University's conduct was not an unknown or sudden issue raised sua sponte by either the trial court or the Supreme Judicial Court but had been the very heart of the action since its inception. Indeed, the University (which asserted its own G.L. c. 93A counter-claim against Linkage) attempted to have Linkage's c. 93A claim resolved at summary judgment before trial, and this issue was at the center of its argument at the trial and post-trial proceedings. On appeal, the University contended that the trial court erred in applying the state statute to its conduct. Posed as a question of state law applicability and interpretation, the Supreme Judicial Court affirmed the trial court's ruling. Accordingly, the Supreme Judicial Court's decision was not a sudden or surprise ruling. Rather, the Supreme Judicial Court's decision was responsive to the state law-based contentions before it. If the University truly believed that applying the state statute to its conduct would violate its federal constitutional rights, it had the obligation to raise it before the trial court. It did not do so.

The due process contention based on the exclusion from evidence of a trial exhibit and the trial judge's alleged bias, in turn, while raised as a "due process" violation before the Supreme Judicial Court, was never presented or argued as a federal question. At the trial level, in its initial motion to recuse as well as in its renewed motion to recuse, the University made no reference to *any* due process argument or provision (state or federal) but instead referenced and relied upon a canon of ethics of the Supreme Judicial Court. The first occasion the University mentioned "due process" was in its appellate brief filed in the Supreme Judicial Court. Even

there, however, the University presented and argued the purported due process claim as a matter of state law. It neither cited, referenced, argued or relied upon the federal due process clause of the Fourteenth Amendment. Instead, it cited and relied upon Article 29, the due process provisions of the Massachusetts Declaration of Rights. As this due process contention was made in the context of the state constitutional provision and principles, the University cannot now transform that contention into a federal constitutional issue. *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); *Street v. New York*, 394 U.S. 576, 584 (1969); *See also Bowe*, 233 U.S. at 664-65 (if state constitution has a due process clause, a claim that "due process" has been violated will be deemed to relate to that clause). The Supreme Judicial Court never addressed the University's due process contention in the context of a federal constitutional question and had no basis to do so.

The "powerful" prudential as well as practical considerations underlying this Court's jurisdiction likewise demand that the Petition be denied. *See Adams*, 117 S. Ct. at 1031; *Crenshaw*, 486 U.S. at 79; *Webb*, 451 U.S. at 500. Because the University has never previously raised or pursued a federal question, neither the trial court nor the Supreme Judicial Court had any opportunity to address its contentions. As a result, there is no record available from which this Court could possibly, and in any meaningful way, review the federal assertions. *See Adams*, 117 S. Ct. at 1031; *Crenshaw*, 486 U.S. at 79; *Webb*, 451 U.S. at 500-501. Moreover, to accept the University's writ, would directly flout comity principles in that neither the trial court nor the Supreme Judicial Court ever understood or were ever afforded the opportunity to respond to the University's purported "federal question" contentions which, according to the University, involve an attack on state authority based on federal law. The Supreme Judicial Court has an "undeniable interest" in having the opportunity to determine the constitutionality of a state statute and a state trial proceeding and, for that matter, to refuse to address any purported constitutional claim because it was not raised at the trial court level. *See Adams*, 117 S. Ct. at 1031; *Gates*, 462 U.S. at 221-222; *Webb*, 451 U.S. at 499.

In no uncertain terms, the University's writ attempts to flout these considerations. It is manifestly too late for the University to raise (or more accurately seek to create) a federal question for the first time in its Petition for Certiorari.

II. EVEN IF A FEDERAL QUESTION WAS TIMELY RAISED, THE DECISION OF THE SUPREME JUDICIAL COURT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE, NOR DOES IT ABRIDGE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

In its decision, the Supreme Judicial Court held that Boston University was subject to liability under the Commonwealth's consumer protection statute, M.G.L. 93A. Section 2(a) of this statute makes unlawful any "[u]nfair acts or practices in the conduct of any trade or commerce." This prohibition has been "extended to those engaged in trade or commerce in business transactions with others similarly engaged." G.L. c. 93A, § 11.[3] *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 779, 489 N.E. 2d 185, 197 (1986), citing *Manning v. Zuckerman*, 388 Mass. 8, 12, 44 N.E. 2d 1262, 1264 (1983).[4]

The determination of whether a party is engaged in "trade" or "commerce" requires consideration of factors such as "the character of the party, the nature of the transaction, the activities engaged in by the party, and whether the transaction was motivated by business or personal reasons." *Barrett v. Massachusetts Insurers Insolvency Fund*, 412 Mass. 774, 775-776, 592 N.E. 2d 1317, 1318 (1992),

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3. Massachusetts General Law c. 93A was originally enacted in 1967. *See* St. 1967, c. 813, §§ 1 and 2. Section 11, which gives a private cause of action to a person engaged in a business who suffers a loss as a result of an unfair or deceptive act or practice by another person also engaged in business, was added in 1972. *See* St. 1972, c. 614, § 2.

4. The purpose of M.G.L. c. 93A is to improve commercial relationships by encouraging "more equitable behavior in the market place." *Poznik v. Massachusetts Medical Professional Ins.*, 417 Mass. 48, 52, 628 N.E. 2d 1, 4 (1994). Chapter 93A liability is imposed on those who seek "to profit from unfair practices." *Id.*

citing *Begelfer v. Najarian*, 381 Mass. 177, 190, 409 N.E. 2d 167, 175-76 (1980). Thus, whether a party is liable under c. 93A for committing unfair or deceptive acts in the conduct of trade or commerce is a determination to be made based on the particular circumstances of each case. *Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 398 Mass. 480, 493, 498 N.E. 2d 1044, 1051 (1986).

In this case, the jury was asked to determine whether Boston University's actions in its dealings with Linkage were charitable or commercial and whether those activities took place in trade and commerce. By way of answers to special questions, the jury found that these activities were commercial and that these activities did, indeed, take place in trade and commerce. The trial judge treated the jury's answers to the special questions with respect to Linkage's c. 93A claim as advisory, and he concluded, based upon his independent review of the evidence, that Boston University's conduct was a commercial transaction and that both parties were engaged in trade or commerce. These factual findings of the trial judge were affirmed on appeal by the Supreme Judicial Court. (A. 27a-34a.) Boston University now seeks to circumvent the Supreme Judicial Court's affirmance of the trial judge's decision by arguing, for the first time, that the Supreme Judicial Court's decision infringes upon its rights under the First and Fourteenth Amendments to the United States Constitution. In its Petition, Boston University argues that the Supreme Judicial Court is treating it unequally from other charitable institutions with no rational basis for doing so. *See, e.g., Yick Wo v. Hopkins*, 188 U.S. 356, 374 (1886) (the right to equal protection is the right not to be treated differently from those similarly situated). The argument has no merit.

A. Even If Accepted As True, The University's Allegations Do Not Rise To The Level Of A Violation Of The University's Rights Under The Fourteenth Amendment.

The University's allegations that the Supreme Judicial Court's decision is "based upon arbitrary and irrational considerations" (Petition at 13) does not state a federal equal protection claim. *Snowden v. Hughes*, 321 U.S. 1, 11 (1943). Likewise, the allegation

that the Supreme Judicial Court decision is "in conflict with the entire body of its prior decisions" (Petition at 14), is insufficient to establish a violation of the Fourteenth Amendment. *Id.* This is unquestionably so because the equal protection clause does not compel uniform decisions by state courts. *Milwaukee Electric Ry. Co. v. Wisconsin ex rel. City of Milwaukee,* 225 U.S. 100, 105-106 (1920); *Beck,* 369 U.S. at 554-555.

Boston University's Petition ignores the settled principle that Federal Courts are not the appropriate courts of appeal for adverse state court rulings which concern only state law. *City of Boston v. Massachusetts Port Authority,* 444 F.2d 167 (1st Cir. 1971). The University's Petition in this case is nothing more than an attempt to open the door for every unsuccessful state court litigant to demand that the United States Supreme Court be the arbitrator of the correctness of state court appellate decisions. There is no basis under the Fourteenth Amendment for this court to grant the Petition because the Fourteenth Amendment should not be employed to assure the uniformity or the correctness of state court rulings. *Snowden,* 321 U.S. at 11; *Smith v. Village of Lansing,* 241 F.2d 856 (7th Cir. 1957).

B. Even If The University's Allegations Rise To The Level Of Constitutional Importance, The Supreme Judicial Court's Decision, Which Affirms The Decision Of The Trial Judge That Boston University Is Subject To M.G.L. c. 93A, Does Not Subject The University To Disparate Treatment In Violation Of The University's Right To Equal Protection Under The Law.

"When a state, or political subdivision thereof, distinguishes between two similarly situated groups, the distinctions it makes are subject to scrutiny under the equal protection clause of the Fourteenth Amendment." *LCM Enterprises, Inc. v. Town of Dartmouth,* 14 F.3d 675, 678-79 (1st Cir. 1994). The level of scrutiny to be applied to such a claim is the rational basis test "unless the distinction involves a suspect classification or burdens a fundamental right." *Id.,* citing *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992); *Freedman v. Rogers,* 440 U.S. 1, 17 (1979).

In order to support its claim of disparate treatment in violation of the equal protection clause, Boston University has the burden of showing that it was treated differently from "persons situated similarly 'in all relevant aspects.' " *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989) (quoting *Smith v. Monsanto Co.*, 770 F.2d 719, 723 (8th Cir. 1885), *cert. denied*, 475 U.S. 1050 (1986). An equal protection violation based upon selective application of a facially valid lawful state law or regulation is found when:

> (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

Wayte v. United States, 470 U.S. 598, 608-09 (1985); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2nd Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

The University has not, and cannot, establish that the Supreme Judicial Court's decision that the University is subject to c. 93A where the University's relationship with Linkage occurred in trade and commerce treats the University differently from other charitable institutions. In addition, the University cannot establish that the Supreme Judicial Court's decision was motivated by impermissible considerations.

Contrary to Boston University's argument, the Supreme Judicial Court has not treated the University differently from other non-profit corporations by subjecting the University to liability under c. 93A. The University misleadingly ignores that Massachusetts courts have routinely allowed c. 93A to be asserted by and against non-profit organizations, including educational institutions. *See e.g., Miller v. Risk Management Foundation of the Harvard Medical Institutions, Inc.*, 36 Mass. App. Ct. 411, 416, 632 N.E. 2d 841, 844 (1994) (a charitable foundation incorporated as an agent of charitable hospital was engaged in "trade or commerce" for c. 93A purposes where its activities were motivated

by business reasons). *See also Nelson v. Blue Shield of Massachusetts, Inc.*, 377 Mass. 746, 387 N.E. 2d 589 (1979); *Massachusetts Farm Bureau Federation v. Blue Cross of Massachusetts, Inc.*, 403 Mass. 722, 532 N.E. 2d 660 (1989); *Essignman v. Western New England College*, 11 Mass. App. Ct. 1013, 419 N.E. 2d 1047 (1981); *Donnelly v. Suffolk University*, 3 Mass. App. Ct. 788, 337 N.E. 2d 920, *cert. denied*, 425 U.S. 955 (1975).

To determine whether c. 93A applies to a defendant, the courts "look at the particular circumstances to determine whether the acts complained of were committed within a 'business context'." *Id.*, citing *Begelfer*, 381 Mass. at 190-191, 409 N.E. 2d at 175-76. The University's status as a nonprofit institution is inconsequential to the issue of whether c. 93A applies to it. *Planned Parenthood*, 398 Mass. at 492-493, 498 N.E. 2d at 1051 (an organization's "status as a 'charitable corporation' is not, in and of itself, dispositive of the issue whether c. 93A applies.")

The evidence at trial was that the University's conduct in this case took place in a business context. Because Linkage sold its services to Boston University, a commercial transaction existed in the sense required by c. 93A. *Manning*, 388 Mass. at 12, 444 N.E. 2d at 1264. The jury determined that Boston University breached its contract with Linkage. The decision of the trial judge, as affirmed by the Supreme Judicial Court, that the University is subject to liability under c. 93A does not subject the University to unequal treatment under the law. To the contrary, the Supreme Judicial Court's decision treats Boston University in the same manner as any other business or institution that enters contracts and then breaches that contract. The Supreme Judicial Court has rightfully held that when the University enters into commercial transactions it cannot shield itself from the consequences of its unfair and deceptive acts by taking refuge in its status as a non-profit corporation.

The University wrongfully relies on the Supreme Judicial Court's decision in *All Seasons Services, Inc. v. Commissioner of Health and Hospitals of Boston*, 416 Mass. 269, 620 N.E. 2d 778 (1993) in support of its disparate treatment argument. The plaintiff

in *All Seasons* was a vending machine company which submitted a bid to the defendant city hospital which rejected the bid in favor of another vending machine company. Central to the Court in holding c. 93A inapplicable, was the determination that the hospital, a charitable organization, did not seek to profit from the "transaction" with the vendor. Further, based on the facts before it, the Court went on to find that the vending machines were "merely incidental to the hospital's primary function of providing medical services." Accordingly, the transaction did not take place in a business context and thus c. 93A did not apply.

In contrast to the facts of *All Seasons*, Boston University contracted with Linkage to develop programs that would generate millions of dollars in revenues so that the University could cover its overhead and generate profit on the Tyngsborough facility. Linkage's development and management of the corporate education center was not "incidental" to the University. Linkage was much more to Boston University than an extraneous vending contractor was to a city hospital. The Supreme Judicial Court's decision in this case is not in conflict with its prior decision in *All Seasons* and the Court's decision is consistent with established Massachusetts law that business activities that occur in trade and commerce are subject to liability under c. 93A.

C. The Supreme Judicial Court's Decision Holding Boston University Liable For Breaching A Contract With Linkage And Violating Massachusetts General Laws Chapter 93A Does Not Violate The University's Rights To Academic Freedom Under The First Amendment.

The University makes the incredible, and unquestionably late, assertion that the Supreme Judicial Court's decision violates the University's right to academic freedom protected by the First Amendment. The reason Boston University has never previously asserted such a claim is because this claim is untenable.

As found by the jury, on July 3, 1991, Boston University breached its renewal contract with Linkage. Executive Vice President Jon Westling, the highest-placed University official under Silber, told assembled Linkage employees that the BU-Linkage

contract had been terminated "for cause" when he knew there was no basis for this claim. Immediately thereafter, armed with written offers of employment to 28 Linkage employees, previously drafted by the University and authorized by Westling, BU officials recruited and hired the 28 of Linkage's 32 employees. Each of these employees had played a pivotal role in marketing, in selling, or in program administration at BUCEC.

Contrary to the argument advanced for the first time in Boston University's Petition to this court, the Supreme Judicial Court has not punished the University based upon "a choice the University has made concerning how to educate." (Petition at 16). The jury's verdict that Boston University breached the renewal contract with Linkage, the trial judge's finding that Boston University violated c. 93A, and the decision of the Supreme Judicial Court affirming those findings, do not implicate academic freedom in even the remotest sense. Rather, Boston University has been held accountable for its willful and bad-faith breach of contract and its violation of the Massachusetts consumer protection statute as a result of its wrongful actions taken against Linkage. The judgment in favor of Linkage does not infringe upon the University's right to academic freedom.

The University is not facing liability under c. 93A because it engaged in particular educational activities at BUCEC. To the contrary, as the Supreme Judicial Court held, the arms-length transaction between Linkage and the University to provide services pursuant to a contract constituted a commercial transaction. In the context of this commercial relationship, the issue posed was whether the University was engaged in "trade or commerce" as required by c. 93A. Because the University's status as a charitable corporation is not dispositive of the issue, the Court considered whether, under the test set forth in *Begelfer*, the conduct complained of was in a "business context." This test requires "assessing the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties. . . . Other relevant factors are whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons . . . and whether the participant played an active part in the transaction."

Begelfer, *supra*, at 191. In the present case, the Supreme Judicial Court stated, "in most circumstances, a charitable institution will not be engaged in trade or commerce when it undertakes activities in furtherance of its core mission. But when, as is the case here, an institution's business motivations, in combination with the nature of the transaction and the activities of the parties, establish a 'business context' as contemplated in *Begelfer*, G.L. c. 93A will apply because the institution has inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play." (A. 32a.) Thus, the distinction from *All Seasons* is compelling.

The University, in a predatory manner, sought to eliminate the middleman, thereby increasing its revenues from programs that Linkage had developed. As the Supreme Judicial Court held, "by creating a pretext to justify terminating the base agreement, denying the existence of the renewal agreement, and then hiring Linkage employees in contravention of contractual prohibition, Silber and Boston University were seeking to 'profit from unfair practices'." (A. 32a), quoting *Poznik*, *supra*, at 53. This decision did not depend on whether the courses offered at BUCEC were vocational in nature as opposed to traditional college courses. The Supreme Judicial Court did not draw any distinction between BUCEC programs and other educational efforts in its determination of the applicability of c. 93A to the University. (A. 32A). Under the required fact specific inquiry set forth in *Begelfer*, the predatory scheme by the University to "profit from unfair practices" (*Poznik*, *supra*, at 53) was the deciding factor of the decision. The University cannot hide behind the banner of "academic freedom" to insulate itself from unfair business dealings with a third-party just because it is a non-profit educational institution. The First Amendment is not implicated on this factual record.

III. THE UNIVERSITY'S FEDERAL DUE PROCESS CLAIMS ARE INSUPPORTABLE AND WHOLLY WITHOUT MERIT MANDATING THE DENIAL OF ITS WRIT APPLICATION.

Leaving aside the complete failure of the University to have ever raised below a federal due process claim, the University's assertions are devoid of even a modicum of substance and do not remotely justify the dignity of this Court's review. The "due process" assertions set forth in the University's writ application contain colossal misrepresentations and mutations of the actual record. Instead of accepting accountability for its wrongful conduct and deceptive dealings motivated by greed and resulting in the near destruction of Linkage as an ongoing business, as found by a jury of Massachusetts' citizens and affirmed by the highest appellate court of the Commonwealth, the University has presented to this Court, under the rubric of "due process," insupportable, false, and scandalous accusations against Linkage's attorneys, the trial judge and the Supreme Judicial Court. The depth of the abyss to which the University has sunk is depicted by its charge that the Supreme Judicial Court, one of the most venerable appellate courts in the nation, was a "capricious" court and that in rendering its decision made "a conscious decision to whitewash the whole proceeding." (Petition at 24). Nothing could be further from the truth and actual record. In no uncertain terms, the University received an eminently fair trial and was provided a full, complete and fair appellate review, which fulfilled any and all conceptions of "due process."

A. The University's Assertion Of Alleged Bias Of The Trial Judge Does Not Implicate Federal Due Process And Otherwise Fails, As It Is Not Based On The Record But Upon Distortion, Misrepresentation And Innuendo.

Beyond doubt, "[a] fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), and certainly there exists a right to an impartial judge. *See Tumey v. Ohio*, 273 U.S. 510 (1927). The University, however, fails to acknowledge principles that further define this right. For instance, the Constitutional validity of a judge's qualifications is not

implicated unless the judge has a "direct, personal, substantial, pecuniary interest" in reaching a particular conclusion in a case. *Tumey*, 273 U.S. at 1248; *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964). Indeed, "most matters relating to judicial disqualifications [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). Mere allegations of judicial bias or prejudice do not state a due process violation. *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, 820 (1986). There exists a presumption of honesty and integrity, and only compelling evidence of "a strong direct interest in the outcome of a case is strong enough to overcome the presumption." *DelVecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1373 (7th Cir. 1994); *In re Larson*, 43 F.3d 412, 414 (8th Cir. 1990).

While the University fawns upon this Court's broad reference to the need for "justice [to] satisfy the appearance of justice," the true question is whether the University was denied a fair trial. *DelVecchio*, 31 F.3d at 1371; *see Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981) ("due process is denied where the litigant is in fact treated unfairly"). The University also fails to recognize that neither the language nor principles under the federal recusal statutes or state/federal judicial canons of ethics have ever been "constitutional" requirements. *See DelVecchio*, 31 F.3d at 1391; *Fero v. Kirby*, 39 F.3d 1462, 1479-80 (10th Cir. 1994). *See also Patterson v. New York*, 432 U.S. 197, 201-202 (1977); *Smith v. Phillips*, 455 U.S. 209, 221 (1982). It is therefore not surprising to find that this Court has found that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Aetna*, 475 U.S. at 820 (quoting *Tumey*, 273 U.S. at 523).

The University's claim of bias is that the trial judge made accusations of "fascism, racism and anti-semitism", subsequently refused to recuse himself, and then, following trial, rendered a written decision under Chapter 93A holding the University accountable for its deliberate breaches and deception. What the University seeks to have this Court do, under the guise of federal due process, which assertion was never raised below, is to assume supervisory control over state judicial proceedings, a power this

Court has steadfastly held not to exist absent federal constitutional transgression. *See Smith*, 455 U.S. at 221; *Fero*, 39 F.2d at 1479-1480 (if disqualifications under Judicial Code implied impermissible bias under due process clause, federal courts would be assuming improper supervising control over issues of judicial disqualification in state courts). The University's bias claim has no basis in the record, in applicable law, and does not remotely raise an issue of constitutional dimension.

Nowhere is there any evidence of bias on the part of the trial judge. He had no pecuniary, direct or personal interest in the case and there is a complete absence of any evidence even remotely suggesting that there existed either an incentive or motive of bias or even an appearance of bias. The University's reference to "fascism, racism and anti-semitism" are fabrications unsupported by a scintilla of evidence in the record and are terms created by the University. *See generally*, *Matter of Wade*, 968 F.2d 241 (7th Cir. 1992) (allegations of judicial bias should never be made without substantiation); *United States v. Burger*, 964 F.2d 1065, *on remand*, 809 F. Supp. 851 (10th Cir 1992) ("conclusions, rumors, beliefs and opinions are not sufficient to form basis for disqualifications"); *In re American Ready Mix, Inc.*, 14 F.3d 1497 (10th Cir. 1994) (judge should not recuse himself based upon unsupported, irrational or highly tenuous speculation).

When the University moved after trial (and an adverse jury verdict) to recuse the trial judge, it charged that the trial judge, "(1) remarked that Dr. Silber had stated that 'Jews are rigid' and that the Court was offended by this alleged statement, (2) characterized the University's actions vis-a-vis Linkage as 'Nazi-Gestapo' tactics, and (3) expressed the opinion that . . . Silber[ ] had been 'pandering to racists' during the 1990 gubernatorial campaign." Again, no averments by affidavit were offered to support the University's allegation of remarks either at trial or on appeal.

As the Supreme Judicial Court expressly found, the University omitted all context in which the alleged remarks occurred and continues to do so before this Court. At the post-trial motion hearing, for instance, the trial judge explained that his and counsel's discussion of the University's alleged "Gestapo-like tactics" in

taking over BUCEC from Linkage occurred in the context of settlement discussions and jury selection.

What makes the University's "bias" contention all the more remarkable is that it was the University that injected into the trial the controversial character of Silber. At the outset of trial, the University filed a motion requesting that the court conduct an individual, in-chambers voir dire of each prospective juror. The University made this extraordinary request "in light of the prominent and often controversial public figure presented by" Silber, who was to be a principal witness at trial. To persuade the trial judge that such a voir dire was necessary, the University submitted print-outs of articles, totalling almost 100 pages, published in the *Boston Globe* and *Boston Herald* from January, 1990, to May, 1994. The subject matter ranged from Silber's ill-fated gubernatorial campaign in 1990 and his inflammatory remarks about the City of Lowell as the "Cambodian capital of America", the "racism of Jews", and Jesse Jackson likened to Adolf Hitler, to Silber's proposals for rationing healthcare for the elderly ("when you're ripe, then it's time to go"); from Silber's confrontation with gays at a 1992 forum and a related letter to Elie Weisel ("decent parents don't even discuss the possibility that there are homosexuals") to Silber's controversial 1993 report to BU's Faculty Council on BU's "resistance to political correctness and ideological fads." As the University argued in its motion, Silber's views have concerned

> consumer activists, environmentalists, public school teachers and administrators, private college faculty and students, the gay community, property owners and/or those who oppose further development of Boston University, performing arts groups, the banking lobby, members of the press, feminists, African-Americans, citizens of Chelsea and Roxbury, firefighters, police officers, working mothers, the elderly, and many others.

There is no constitutional issue. There was no actual bias nor any appearance of bias of the trial judge remotely implicating federal due process rights. The University's unrestrained assault

on the trial judge's character, his motivation, his judicial disinterest and sense of fairness as well as the integrity of the review provided by the Supreme Judicial Court is of its own creation not in any way based on fact or the record and results solely from the University's own desperation and mutation of the record.

B. The University's Right To A Fair Trial Was Not Remotely Implicated By The Exclusion Of Its Exhibit 1.

The University makes the incredible assertion that the trial judge's exclusion of its Exhibit 1 constituted a deprivation of due process. How the exclusion of a solitary exhibit by a state trial judge based on state evidentiary law in a breach of contract trial (which ruling was upheld by the state's highest appellate court) can possibly rise to the level of federal due process or otherwise raise a significant constitutional issue is a mystery.

The obvious and fatal flaw to the University's argument (and despite other failings) is that Exhibit 1 should have never even been presented to the jury at all. It was based exclusively on the summary judgment decision of Judge King, which Linkage had vigorously contended was an erroneous ruling and which the Supreme Judicial Court, upon careful review, agreed. The Supreme Judicial Court found that the summary judgment ruling was in error and that the trial judge was fully justified in allowing all of the disputed issues to go to the jury. According to the Supreme Judicial Court, "facts in the exhibit were contradicted by Linkage's evidence at trial and, because the exhibit was based on an erroneous grant of partial summary judgment, any statements in the exhibit were misleading." (A. 17a).

When Linkage requested that Exhibit 1 be struck, (continuing objection existed throughout the trial), its primary point was that "Exhibit 1 was just plain wrong in that it conflicted with existing evidence." The trial judge likewise was concerned that the evidence was contrary to certain "facts" contained in Exhibit 1:

> I rule that the documents which have been provided to the Court this morning indicate, clearly, that the issue as to whether or not the PDS contract terminated is a

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> jury question . . . Under such circumstances, and in view of the fact that Exhibit No. 1 is fraught with danger, I strike Exhibit 1.

Finally, the trial court did not in any way suggest to the jury that the exhibit was being struck because of anything the University had done, but only advised them that the evidence, as it had come in during trial, contradicted portions of Exhibit 1. Nothing the judge said discredited the University. In short, the University did not suffer and cannot remotely show any prejudice (never mind constitutional prejudice) resulting from the state evidentiary ruling by the trial court which was, in any event, entirely proper.

C. The Supreme Judicial Court's Review And Approval Of The Proven Damages To Linkage And Finding That The Willful, Knowing Violations Of Chapter 93A Entitled Linkage To Double Damages Did Not Violate Due Process Guarantees.

The University's assertion that its federal due process rights were violated by the damage award rendered by the jury, adopted by the trial judge, and affirmed by the Supreme Judicial Court on appeal is without merit. Not only was the University's federal constitutional assertion never raised in the state court proceedings, but the contractual damage award was based on state law and firmly rooted in the evidence, not remotely implicating due process. Indeed, other than its argument advanced with respect to Exhibit 1, there is nothing else claimed by the University which caused the jury to award an unreasonable or even arguably unconstitutional verdict. The University's argument has no basis in fact and its attack against the Supreme Judicial Court for "negligent or conscious disregard of the evidentiary record" deserves sharp rebuke. (Petition at 26).

The $2,148,000 contract award is supported by an abundance of evidence at trial, including a multitude of trial exhibits and exhaustive (and thoroughly cross-examined) testimony from Linkage's Chief Financial Officer (Carr) and President (Harkins). The evidence included an expected return on sales of 19.3% for 1991 and Linkage's management fee for fiscal year 1992 of

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$3,118,000, which after expenses left a projected net profit of $716,000.[5] This testimony was based on Carr's and Harkins' experience;[6] industry surveys of companies in the educational, consulting, training and development business; and the fact that Linkage did not have high marketing and sales expenses. Profit margins would increase due to Linkage's expansion into new markets both in the United States and abroad because it would not have the start-up expense of new program development. Further, pro forma revenue statements and business plans were introduced into evidence showing projected revenues at BUCEC growing from $15,400,000 in fiscal year 1992 to $22,900,000 in fiscal year 1994.

The University argued to the jury, and then again to the Supreme Judicial Court, that the contract damages had not been proven. This was a question of fact that hinged on the credibility of the evidence Linkage introduced to support its contract damages, and application of state contract law and cannot now be magically transformed into a federal constitutional issue. *See, e.g.*, Sup. Ct. R. 10 ("application for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Moreover, the jury and the Supreme Judicial Court likely rejected the University's assertion because by adding expenses of $1,524,000 and $1,648,000, the University has double-counted the expenses of the FPDP payroll. The University persists in making the same mathematical error, failing to understand basic accounting, and failing to give credit to the jury and the Supreme Judicial Court, which found that the jury's award of lost profits was supported by evidence presented at trial and testimony on projections of future performance based on Linkage's past performance. Damages were calculated under correct (and unchallenged) instructions of law,

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5. The admissibility of the supporting exhibits were never challenged by the University on appeal to the Supreme Judicial Court.

6. Carr testified as both a fact and an expert witness and had, at the time of trial, twenty years of experience in business management, financial analysis and valuation of businesses. His qualifications were never challenged by the University.

and the University's belated assertion cannot possibly rise to the level of a federal constitutional question.

The doubling of the contract award under c. 93A likewise raises no constitutional concern. Under c. 93A, the judge is required to double the damages if there is a finding that the violation is knowing and willful. Both the jury and the trial judge, as well as the Supreme Judicial Court, found that the University's violation of Chapter 93A was knowing and willful. Based on the evidentiary record, there could be no other conclusion. As the Supreme Judicial Court found:

> The judge was warranted in finding that Boston University's actions in the months leading up to, and after, the termination were unethical and unscrupulous, and Silber's and Westling's conduct, in particular, was unfair, oppressive, and deceptive. The University and its principals repudiated binding agreements and usurped Linkage's business and workforce in order to promote a purely self-serving agenda.

(A. 33a.). The trial court, as well as the Supreme Judicial Court, were entitled to double or triple the damages to carry out the legislative intent to punish such conduct. The doubling does not remotely offend any notion of due process, as it was firmly grounded in the evidence and reasonably related to the University's deceptive conduct. There is no constitutional issue meriting any review by this Court.[7]

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7. As Justice Kennedy has remarked: Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts. There is a principled justification too in the composition of the jury, for its representative character permits its verdicts to express the sense of community. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 40 (1991) (Kennedy, J. concurring).

CONCLUSION

For the reasons discussed above, respondent Linkage Corporation respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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